BEFORE THE WASHINGTON STATE
OFFICE OF THE INSURANCE COMMISSIONER

In The Matter Of The Application Regarding The Conversion And Acquisition Of Control Of Premera Blue Cross And Its Affiliates	No. G02-45 INTERVENORS' RESPONSE TO PREMERA'S BRIEFING ON PRIVILEGE ISSUES FOR THE SPECIAL MASTER

I. INTRODUCTION

Intervenors face a significant challenge in submitting briefing in response to Premera's "Briefing on Privilege Issues." On one hand, the Intervenors' lack of access to the documents at issue necessarily requires a more general discussion of the attorney-client privilege and work product doctrine. On the other hand, however, Intervenors are cognizant of the fact that the Special Master is well-versed in Washington law concerning these issues. *See, e.g., State v. American Tobacco Co.*, 1997 WL 728262 (Wash. Sup. Ct. 1997) (attached as *Exh. A*).

Intervenors therefore address a few issues likely to be implicated in the *in camera* review, and respond to certain arguments raised by Premera in its submission (and, most particularly, its considerable liberties in recounting the law of privilege). Intervenors, however, invite the Special Master to request briefing on any specific topic or area of concern that may arise during the review.

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II. ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is strictly and narrowly construed in Washington. *Dike v. Dike*, 75 Wn.2d 1, 11, 448 P.2d 490 (1968) (privilege "cannot be treated as absolute; but rather must be strictly limited to the purpose for which it exists."). In Washington, the burden of establishing the privilege rests with the asserting party, who must affirmatively establish that not only an attorney-client relationship exists, but that disclosure would reveal "communications that were both legal in nature and confidential." *American Tobacco Co.*, 1997 WL 728262 at *3 (citing authorities).

A. Legal, Not Business, Advice Must Be Implicated

For the purpose of properly invoking privilege, the client must seek legal advice or services. *See In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984); *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982). Communications to lawyers for business purposes are not privileged and business advice, even if rendered by an attorney, is not subject to protection. *State v. Dorman*, 30 Wn. App. 351, 359, 633 P.2d 1340 (1981).

> To warrant protection under the attorney-client privilege, a communication must reflect a request for or the giving of legal advice. The involvement of the attorney must be in his or her professional capacity . . . .

American Tobacco Co., 1997 WL 728262 at *2 (citing authorities).

As a result, documents created in the ordinary course of business do not attain the privilege merely by sending the document to counsel. *See F.C. Cycles Int'l, Inc. v. Fila Sport, S.p.A.*, 184 F.R.D. 64, 71 (D. Md. 1998) (business documents "do not attain privileged status solely because in-house or outside counsel is 'copied in'"); *United States Postal Serv. v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 163-64 (E.D.N.Y. 1994) (documents were not privileged because they "were written for some

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purpose other than to seek legal advice and would have been prepared whether or not the attorney was sent a copy").

Courts recognize that communications between lawyer and client may have multiple purposes. This issue frequently arises when in-house counsel are involved, because business and legal functions are often "inextricably intertwined." *Coleman v. American Broadcasting Co.*, 106 F.R.D. 201, 206 (D.D.C. 1985). Accordingly, the standard is whether the communication is "predominantly legal, as opposed to business, in nature." *Boca Investment Partnership v. United States*, 31 F. Supp.2d 9, 11 (D.D.C. 1998). *See also Henson v. Wyeth Laboratories, Inc.*, 118 F.R.D. 584, 588 (W.D. Va. 1987) ("the court finds the documents to have been prepared primarily in a business capacity and not primarily in a legal capacity").[1]

Where in-house counsel is involved in both business and legal decisions, no presumption of privilege exists. *United States v. ChevronTexaco Corp.*, 241 F. Supp.2d 1065, 1076 (N.D. Cal. 2002). Instead, the burden is on the Premera to "make a clear showing" that "the 'primary purpose' of the communication was securing legal advice." *Id.* at 1076. If Premera fails to carry its burden, the documents should be produced.

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[1] Courts also recognize, either explicitly or implicitly, that the analysis may apply to individual statements, rather than on a document by document basis. *See United States v. Chevron Corp.*, 1996 WL 444597 at *1-2 (N.D. Cal. May 30, 1996) ("the 'primary purpose' test must be applied to distinct communications within each document"). This approach provides the basis for redacting legal communications contained within otherwise nonprivileged documents. *Burroughs Wellcome Co. v. Barr Laboratories, Inc.*, 143 F.R.D. 611, 618 (E.D.N.C. 1992) ("To the extent that legal advice and strategy . . . is contained with these documents [addressing business concerns], they should be redacted."). However, if the entire document was prepared for "both legal and nonlegal personnel within the corporation," then the entire document must be produced. *Chevron Corp.*, 1996 WL 444597 at *2.

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B. Standards For Evaluating Communications Between Premera And Its Consultants Under The Attorney-Client Privilege

Premera's decision to attempt to convert to for-profit status is a quintessential business decision. That Premera anticipated going through administrative or legal challenges to that decision does not instill protection upon all the documents created in analyzing the tax, investment banking or public relations effects of this decision simply because "[t]hese consultants were retained by Premera's counsel in furtherance of rending legal advice to the company." Premera's Brief, p. 4.

The standard for protection is far more rigorous than Premera suggests. The lead case on the protection of communication involving third parties is *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961). *See State v. Aquino-Cervantes*, 88 Wn. App. 699, 707-08, 945 P.2d 767 (1997) (adopting *Kovel* approach). Under the *Kovel* doctrine, a communication involving a third party (such as an accountant or investment banker) is entitled to protection only if the involvement of the third party is ***essential*** for the attorney to understand the communication. As one court recently noted:

> The interpreter analogy and the statement that the accountant is needed to facilitate the client's *consultation* both strongly indicate that *Kovel* did not intend to extend the privilege beyond the situation in which an accountant was interpreting the client's otherwise privileged communications or data in order to enable the attorney to understand those communications or that client data.

ChevronTexaco Corp., 241 F. Supp.2d at 1071 (italic in original). As the court noted, "*Kovel* explicitly excludes the broader scenario in which the accountant is enlisted merely to give his or her own *advice* about the client's situation." *ChevronTexaco*, 241 F. Supp.2d at 1072 (italic in original). As a result, hiring an accountant to give additional tax advice (rather than simply interpreting material for the attorney to enable the attorney to render advice) is not protected:

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> [*Kovel*] precludes extension of the privilege where the accountant is hired merely to give additional legal advice about complying with the tax code even where doing so would assist the attorney in advising the client.

ChevronTexaco, 241 F. Supp.2d at 1072. Therefore, it is not enough that the third parties' participation was helpful to the attorney:

> Contrary to the [defendant's] assertion that a mere finding that an accountant was "useful" is all that is required under *Kovel*, "[t]he available case law indicates that the 'necessary' element means more than just useful and convenient. The involvement of the third party must be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications. Mere convenience is not enough."

Cavallaro v. United States, 284 F.3d 236, 249 (1st Cir. 2002) (*quoting* Epstein, The Attorney Client Privilege and the Work Product Doctrine, 168-69, 187 (4th ed.)).

If a communication with a third party is not entitled to protection under the *Kovel* doctrine, then the material must be produced:

> Because we have concluded that no *Kovel* relationship existed between Chevron and Price Waterhouse for purposes of these communications, we also conclude that Chevron has not maintained confidentiality with respect to the communications . . . .

ChevronTexaco, 241 F. Supp.2d at 1074. Because Premera has made no such demonstration that privilege applies, the disputed documents should be produced.

C. Meeting Minutes Are Generally Not Protected

Meeting minutes are generally not privileged. *See Great Plains Mut. Ins. Co., Inc. v. Mutual Reinsurance Bureau*, 150 F.R.D. 193 (D. Kan. 1993) ("the mere fact that an attorney was present during the board of directors' meetings does not, in and of itself, shield disclosure"). Protection is appropriate only if the minutes contain legal advice, as opposed to business advice. *Misek-Falkoff v. International Bus. Machines Corp.*, 144 F.R.D. 48, 49 (S.D.N.Y. 1992) (attorney attending meeting does not render the

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minutes privileged unless party can demonstrate that legal advice was incorporated in the communication); *Burroughs Wellcome Co.*, 143 F.R.D. at 618 (finding meeting minutes not privileged, because the attorney-client privilege does not protect non-legal business advice given by a lawyer).

III. WORK PRODUCT

In *Hickman v. Taylor*, 329 U.S. 495, 512 (1947), the Supreme Court deemed that the work product of a lawyer covers the "written material obtained or prepared by an adversary's counsel with an eye toward litigation." *Id.* at 511. It includes "interviews, statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs." *Id.* As with attorney-client communications, the party asserting a privilege bears the burden of proving that the privilege applies, and that it has not been waived. *Weil v. Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18, 25 (9th Cir. 1981).

No work product immunity exists for documents prepared in the normal course of business. *Escalante v. Sentry Ins.*, 49 Wn. App. 375, 395, 742 P.2d 832 (1987). In contrast to Premera's assertion that documents created for both a business and legal purpose are entitled to protection, the rule, in fact, is just the opposite:

> Where a document was created for both a legal and a nonlegal purpose (i.e., where the document would have been created even if there were no pending or anticipated litigation), the protections of CR 26(b)(4) do not apply.

American Tobacco Co., 1997 WL 728262 at *10 (citing authorities). Much, if not all, of the work performed by Premera's consultants would have been necessary whether litigation was likely or not. Tax advice and analysis, communications with investment banking firms, and public relations are all categories of business activities that were required even if there had been no expectation of litigation. As a part of its prudent business practices, Premera necessarily analyzed the potential tax and accounting

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ramifications of the conversion regardless of any anticipated litigation. This type of information is not entitled to protection. As the *ChevronTexaco* court noted:

> [D]ocuments that reflect only the logistics or mechanics of implementing business concepts will not, on their face, reflect reasoning about the anticipated litigation and do not appear to be informed by concerns about that litigation. With respect to this type of document, Chevron's business needs clearly would necessitate creation of the document. These documents were prepared in the "ordinary course of business or . . . would have been created in essentially similar form irrespective of the litigation."

ChevronTexaco, 241 F. Supp.2d at 1084 (*quoting United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998)). Simply because Premera may believe that someone may challenge its business decision to convert does not convey protection on the documents that went into the original decision.

IV. CONCLUSION

Intervenors stand ready to brief any additional issues that may arise during the *in camera* review, and invite such an opportunity.

Dated this 4th day of August, 2003.

Respectfully submitted by:

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On behalf of all Intervenor Groups, with authority.

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Exhibit A

Superior Court of Washington.

STATE of Washington, Plaintiff,
v.
AMERICAN TOBACCO CO., INC., et al.,
Defendants.

No. 96-2-15056-8 SEA.

Nov. 21, 1997.

ORDER ON STATE'S MOTION TO COMPEL PRODUCTION OF CERTAIN CTR DOCUMENTS PRODUCED IN BURTON v. RJR TOBACCO

FINKLE, J.

***1** The State has moved to compel defendant R.J. Reynolds Tobacco Company ("RJR") to produce certain Council for Tobacco Research ("CTR") documents. RJR claims that each of the 32 documents, or a portion thereof, is protected by the attorney-client privilege, by work product immunity, or by both. The State asserts that the documents are not privileged or subject to work product immunity, and that, in any case, the civil fraud exception applies. [FN1]

FN1. The State has not raised any specific challenge to RJR's assertion of the joint defense privilege. Thus, if the attorney-client privilege or work product protection applies, such privilege or protection is not abrogated based on disclosure to one or more of the codefendants.

After considering the arguments of counsel regarding the potentially privileged nature of the documents, the court ordered *in camera* production and gave the parties an opportunity to file supplementary briefs regarding the applicability of the fraud exception. The court has reviewed the documents submitted for *in camera* review pursuant to that order, as well as the related **privilege logs** prepared in the *Burton* and *Humphrey* cases [FN2] and the supplemental submissions of the parties. [FN3] While this court is familiar with the *Burton* rulings, the asserted attorney-client privilege, work product immunity, and civil fraud exception have been evaluated *de novo.*

FN2. *Burton v. R.J. Reynolds Tobacco Co., Inc.,* 170 F.R.D. 481 (D.Kan.), *on reconsideration,* No. 94-2202-JWL, 1997 WL 536084 (D.Kan. August 14, 1997); *State of Minnesota by Humphrey v. Philip Morris, Inc.,* No. C1-94-8565 (Dist.Ct.Minn.).

FN3. To provide RJR with a meaningful opportunity to argue the applicability of the privileges without disclosing the contents of the documents to the State, the court allowed RJR to file its submission *in camera.*

1. Document 506527953-7958. "R & D Weekly Highlights."

This memorandum, stamped "RJR Confidential," was written by an RJR scientist for an RJR managerial employee. RJR asserts that the persons identified on the document as receiving copies were RJR employees, scientists, and in-house counsel.

The memorandum summarizes various research and development activities. With the exception of two paragraphs, one of which falls under the heading "Tax Stamp Ink Solvent" and the other under "Environmental Tobacco Smoke Research/Information: TI-ETS Advisory Committee," the entire document has already been produced to the State. RJR has asserted the attorney-client privilege as to the remaining two paragraphs.

a. Communication Regarding the "Tax Stamp Ink Solvent"

The "Tax Stamp Ink Solvent" paragraph reveals the substance of RJR's inquiry to its attorney regarding a dispute with one of RJR's vendors. The attorney-client privilege, pursuant to RCW 5.60.060(2), prohibits disclosure of communications, whether oral or written, between an attorney and a client given in the course of the attorney's professional employment. *Seattle Northwest Sec. Corp. v.. SDG Holding Co., Inc.,* 61 Wash.App. 725, 736, 812 P.2d 488 (1991); *Kammerer v. Western Gear Corp.,* 27 Wash.App. 512, 517-18, 618 P.2d 1330, *aff'd,* 96 Wash.2d 416, 635 P.2d 708 (1981).

The forced disclosure of this paragraph would reveal the substance of the client's inquiry and the client's perceived need for an attorney's legal guidance, thereby violating the attorney-client privilege. RJR's consultation with counsel regarding the "Tax Stamp Ink Solvent" issue is, therefore, privileged.

To maintain the privilege, however, the communication must have been made, and kept, in confidence. If a communication is intended to be, or is, disclosed to others, any applicable privilege is lost. *State v. Sullivan,* 60 Wash.2d 214, 217-18, 373 P.2d 474 (1962); *Ramsey v. Mading,* 36 Wash.2d 303, 312, 217 P.2d 1041 (1950). The *Burton* court did not consider the applicability of the attorney-client privilege to this paragraph because RJR failed to raise the issue. According to RJR's attorney, it was not until RJR prepared its **privilege log** for the *Humphrey* litigation that it claimed the privilege.

***2** While the inadvertent production of a privileged document can often be remedied by returning the document to the producing party, without waiver of privilege, in this case, RJR reviewed the document in preparation for the *Burton* privilege analysis and chose not to redact this paragraph. Once that deliberate choice was made, any privilege otherwise applicable to the "Tax Stamp Ink Solvent" paragraph was waived and cannot be recovered by a subsequent claim of inadvertence.

b. Communication Regarding "Environmental Tobacco Smoke"

To warrant protection under the attorney-client privilege, a communication must reflect a request for or the giving of legal advice. The involvement of the attorney must be in his or her professional capacity and not merely as a convenient conduit for information or funds. *R.A. Hanson Co. v. Magnuson,* 79 Wash.App. 497, 502, 903 P.2d 496 (1995), *review denied,* 129 Wash.2d 1010, 917 P.2d 130 (1996). Communications with an attorney that do not involve legal advice are not privileged.

> The privilege for communications of a client with his lawyer hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice ... [W]here one consults an attorney not as a lawyer but as a friend or as a business adviser or banker, or negotiator, or as an accountant, or where the communication is to the attorney acting as a "mere scrivener" or as an attesting witness to a will or deed, or as an executor or as agent, the consultation is not professional nor the statement privileged."

State v. Dorman, 30 Wash.App. 351, 359, 633 P.2d 1340, *review denied,* 96 Wn .2d 1019 (1981) (citing E. Cleary, *McCormick On Evidence* sec. 88 (2d ed.1972) (citations omitted)). Generally, if the task assigned to an attorney could have been performed by an individual with no legal training, the attorney has not been consulted in his professional capacity. *Burton,* 170 F.R.D. at 485 ("The fact that the client chose to channel the work through an attorney rather than perform the work with non-legal personnel does not provide the basis for a claim of privilege.").

The redacted paragraph under the heading "Environmental Tobacco Smoke Research/Information: TI-ETS Advisory Committee" does not involve legal advice. The paragraph relates to the activities of a Philip Morris scientist and outside counsel. The redacted paragraph offers no indication that the attorney's involvement was the result of a specific legal question posed by defendants, that the activities would result in a legal, as opposed to a scientific, analysis, or that any legal advice would be generated by the activities. No confidential legal communications between attorney and client are disclosed in the paragraph. It appears that a non-lawyer could have participated in the events recited without any injury to defendants' legal position. Because the communications were not legal in nature, no privilege applies.

2. Document 504484390-4395. "Weekly Highlights--Biochemical/ Biobehavioral For Week of May 20 - May 24, 1985."

***3** This memorandum was written by one RJR scientist for the benefit of another RJR scientist. RJR asserts that the persons identified on the document as receiving copies were RJR employees, scientists, and in-house counsel. A note in the margin states "circulate."

The memorandum summarizes on-going or recently published studies on smoking and health. With the exception of a paragraph headed "Metabolism/Pharmacokinetics," the entire document has already been produced to the State. RJR has asserted the attorney-client privilege as to this paragraph, which states that in-house counsel had been requested to provide "legal input" on a draft work statement.

The burden of showing the applicability of the attorney-client privilege rests with the party asserting the privilege. *R.A. Hanson Co.,* 79 Wash.App. at 501, 903 P.2d 496. Thus, RJR has the burden of

showing not only that an attorney-client relationship existed, but that the disclosure of a particular document or portion thereof would reveal communications that were both legal in nature and confidential. *Id* . at 502, 903 P.2d 496; *Sullivan,* 60 Wash.2d at 217-18, 373 P.2d 474.

RJR has failed on both counts. First, the paragraph does not reveal the substance, if any, of RJR's request for legal advice or in-house counsel's response. The only information provided is that in-house counsel was asked to comment on a document, a fact which is not, in and of itself, privileged. *See State v. Chervenell,* 99 Wash.2d 309, 316, 662 P.2d 836 (1983); *State v. Hartley,* 56 Wash.App. 562, 565-66, 784 P.2d 550 (1990); *Clarke v. American Commerce Nat'l Bank,* 974 F.2d 127, 129 (9th Cir.1992). Second, the fact that the entire document, including this paragraph, was apparently widely circulated makes it impossible to conclude, in the absence of any contrary evidence from RJR, that the document was created or maintained in confidence. Thus, RJR's claim of privilege fails.

3. Document 506464000-4011. "Weekly Highlights--Biochemical/ Biobehavioral Week Ending August 28, 1987."

This memorandum, stamped "RJR Confidential," was written by one RJR scientist for the benefit of another RJR scientist. RJR asserts that the persons identified on the document as receiving copies were RJR scientists and in-house counsel.

The memorandum summarizes on-going or recently published studies on smoking and health. With the exception of two sentences, the entire document has already been produced to the State. RJR has asserted the attorney-client privilege as to these two sentences, which summarize a meeting with in-house counsel at which RJR's obligations under and compliance with certain regulatory schemes were discussed.

The goal of the privilege is to encourage clients to consult with their attorneys by protecting confidential communications from public disclosure. Only through such protections will clients feel secure enough to fully inform their attorneys of all relevant facts, thereby making the provision of legal advice possible and effective. *Dietz v. Doe,* 131 Wash.2d 835, 842, 935 P.2d 611 (1997); *Escalante v. Sentry Ins.,* 49 Wash.App. 375, 393, 743 P.2d 832 (1987), *review denied,* 109 Wash.2d 1025 (1988); *R.A. Hanson,* 79 Wash.App. at 502, 903 P.2d 496. In determining whether a party should be forced to disclose particular communications, the court must balance the effect such disclosure would have on the attorney-client relationship against the legitimate interests of the party seeking discovery. *Seventh Elect Church of Israel v. Rogers,* 102 Wash.2d 527, 534-35, 688 P.2d 506 (1984). The court finds that the disclosure of the two sentences at issue would reveal the substance of RJR's inquiry, thereby chilling a client's willingness to place its legal problems before counsel. RJR's claim of privilege is valid.

***4** To maintain the privilege, however, the communication must have been made, and kept, in confidence. *Sullivan,* 60 Wash.2d at 217-18, 373 P.2d 474; *Ramsey,* 36 Wash.2d at 312, 217 P.2d 1041. The *Burton* court did not consider the applicability of the attorney-client privilege to these sentences, specifically noting that only work product immunity was claimed. For the reasons stated in Section 1.a. above, RJR has waived the privilege as to this paragraph.

4. Document 504651149-1158. "First Quarter Report--Biochemical/ Biobehavioral."

This memorandum was written by one RJR scientist for the benefit of another RJR scientist. RJR asserts that the persons identified in the document as receiving copies were RJR scientists.

The memorandum summarizes the activities of the Biochemical/ Biobehavioral Group, including personnel changes, seminar attendance, additive and pesticide research, and RJR plant conditions. With the exception of one sentence on an attached handwritten note, the entire document has already been produced to the State. RJR has asserted the attorney-client privilege as to this sentence.

The redacted sentence reveals in-house counsel's advice regarding the drafting of these reports. While it is not clear to what inquiry counsel is responding, it may be inferred from the context that the advice addresses a legal, rather than a business, concern. RJR's claim of privilege is valid.

The State has alleged, however, that any privilege to which RJR might otherwise be entitled is abrogated by the civil fraud exception. Both the attorney-client privilege and the work product immunity are destroyed where a party attempts to use one or both of the protections to further on-going or future fraudulent conduct. *United States v. American Tel. & Tel. Co.,* 86 F.R.D. 603, 624 (D.D.C.1980). To strip a communication of an otherwise applicable privilege

or immunity, the party seeking discovery must show (1) that its opponent was engaged in or was planning a crime or fraud at the time the allegedly privileged communication was made and (2) that the communication was made in furtherance of such activity. *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 95-96 (3d Cir.1992).

While the above two-prong test for determining the applicability of the civil fraud exception is widely accepted, the standard of proof necessary to make such a showing is in dispute. The Washington State Court of Appeals has stated that the party seeking discovery has the burden of showing a "foundation in fact for the charge of civil fraud." *Escalante*, 49 Wash.App. at 394, 743 P.2d 832. In *Escalante,* the plaintiffs argued that an insurer's evaluation of damages should be produced under the civil fraud exception. After noting that "[t]he exception is usually invoked only upon a prima facie showing of bad faith tantamount to civil fraud," the court recognized "the proof problems inherent in requiring a prima facie showing at the discovery stage" and adopted the "foundation in fact" requirement. *Id.* If, as is suggested by the opinion, the *Escalante* court intended to require a showing that was less stringent than that required to make out a prima facie case, the court made no attempt to describe the contours of such a showing.

***5** When analyzing the applicability of the civil fraud exception in the present case, the court has tried to reach a balance between *Escalante* 's apparent willingness to abrogate the privilege on a minimal showing and the importance of protecting confidential attorney-client communications. The court has been unable to discern workable boundaries to *Escalante* 's "foundation in fact" standard and, therefore, resorts to the least onerous of the commonly used standards of proof: a prima facie showing. Even if a lower standard than a prima facie showing were applied, the court's rulings would be unchanged.

Mere allegations of fraud, unsupported by any evidence, will not overcome the attorney-client privilege or work product immunity. *Clark v. United States*, 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.Ed. 93 (1933). To drive the privilege away there must be something to give color to the charge of fraud; there must be prima facie evidence that the charge has some foundation in fact. *Id.* (citations omitted); *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1551 (10th Cir.1995), *cert. denied,* 517 U.S. 1190, 116 S.Ct. 1678, 134 L.Ed.2d 781 (1996).

The party seeking discovery is required to offer evidence which, if believed, would support a finding that the civil fraud exception applies before the documents at issue will be ordered disclosed. A prima facie showing requires evidence which, when assumed to be true, supports a "logical and reasonable deduction" that an asserted fact is true. *State v. Solomon,* 73 Wash.App. 724, 727, 870 P.2d 1019, *review denied,* 124 Wash.2d 1028, 883 P.2d 327 (1994) (citations omitted). Such a showing does not require the proponent to establish the asserted fact beyond a reasonable doubt or even by a preponderance of the evidence. *Id.* [FN4]

> FN4. RJR asserts that the State must make a showing by a preponderance of the evidence before the civil fraud exception would apply. *See Laser Indus. Ltd. v. Reliant Techs., Inc.*, 167 F.R.D. 417 (N.D.Cal.1996); *Haines,* 975 F.2d at 96-97. The above-cited cases have no precedential value in the courts of Washington and do not overturn or diminish the authority of *Escalante* and *Seattle Northwest Sec.*
> Further, even if the court were to require the State to show that it is more likely than not that RJR was engaged in or planning a crime or fraud and that the communication was in furtherance thereof, RJR has failed to offer any evidence regarding the exception's applicability to the 32 documents at issue here. In its *In Camera* Memorandum in Connection With Its *In Camera* Submission of 32 Privileged Documents, RJR attempts to rebut many of the documents the State submitted with its motion and subsequent filings, but makes no effort to explain or otherwise counteract the inferences of fraud that can be drawn from certain of the 32 documents themselves. In the absence of countervailing evidence on the part of the non-moving party, the *prima facie* and preponderance of the evidence standards yield the same result.

The contents of the contested documents themselves may provide the necessary evidence of civil fraud. *Escalante*, 49 Wash.App. at 394, 743 P.2d 832. However, each document must be considered separately to determine whether it provides evidence that supports the State's allegations that defendants engaged in fraud and conferred with their attorneys in furtherance thereof. Only then must the communication be produced under the civil fraud

exception. *Id.* at 394, 743 P.2d 832; *Seattle Northwest Sec.*, 61 Wash.App. at 741, 812 P.2d 488; *In re A.H. Robins Co., Inc.*, 107 F.R.D. 2, 15 (D.Kan.1985).

The State has alleged three broadly described "frauds" as the bases of its claim that the civil fraud exception applies. First, the State alleges that defendants used CTR, and in particular CTR's Special Projects division, to mislead the public into believing that independent scientists disputed the claim that smoking causes illness. Second, the State alleges that RJR itself engaged in fraud insofar as it was aware of, and concealed, the health risks associated with its products. Third, the State alleges that the documents furthered defendants' violation of Washington's antitrust laws by "suppressing health-based competition and retarding the development of safer products." State of Washington's Supplemental Submission Concerning the *Burton* Documents at 7.

***6** The 32 documents considered as a whole provide evidence that supports the State's assertions that defendants used CTR to mislead the public and/or that RJR concealed health risks associated with its products. The court finds that the State has made a prima facie showing that RJR was engaged in or was planning a fraud at the time certain of the recorded communications were made. The redacted sentence in document 4, however, contains no indication that this advice was in any way related to the alleged frauds. RJR's claim of privilege is upheld and the redacted sentence need not be produced.

5. Document 504085341-5346. "Weekly Highlights--Biochemical/ Biobehavioral For Week of May 13-17, 1985."

This memorandum, stamped "RJR Confidential," was written by one RJR scientist for the benefit of another RJR scientist. RJR asserts that the persons identified on the document as receiving copies were RJR scientists, employees, and in-house counsel.

The memorandum summarizes the activities of the Biochemical/Biobehavioral Group. With the exception of one paragraph under the heading of "TI/ETS Working Group," the entire document has already been produced to the State. RJR has asserted the attorney-client privilege as to this paragraph.

The redacted paragraph discloses the Committee of Counsel's advice regarding a particular scientific research proposal and is, therefore, privileged. A client should be permitted, without fear of disclosure, to ask his or her attorney about the legal implications and advisability of conducting a particular product review or study. Whatever the attorney's response, both the inquiry and the resulting advice are privileged as long as the evaluation was primarily legal in nature. The text of the redacted paragraph gives rise to the inference that the attorneys participated in their professional capacity, and not merely as scriveners or business advisers. The fact that an attorney was involved in the analysis suggests that his or her legal expertise was required. Nothing in the memorandum defeats that inference. *See United States v. Chen*, 99 F.3d 1495, 1501-02 (9th Cir.1996), *cert. denied*, 520 U.S. 1167, 117 S.Ct. 1429, 137 L.Ed.2d 538 (1997) (citing 8 Wigmore, *Evidence* sec. 2296 (rev. ed.1961). Thus, RJR's claim of privilege is valid.

As was the case with document 4, the State has alleged that any privilege to which RJR might be entitled is abrogated by the civil fraud exception. The redacted paragraph appears to have nothing to do with CTR and contains no evidence that RJR concealed dangers allegedly posed by its products. The State argues that any involvement of the Committee of Counsel in the approval of research projects must constitute fraud, since the attorneys could have no legitimate involvement in RJR's decisions regarding scientific study. Such a position is too broad, however, as it would prevent a client from making legitimate inquiries regarding the legal implications and advisability of conducting scientific research or product review. Absent some evidence, either from the document itself or from the surrounding circumstances, that counsel's evaluation of the research project was in furtherance of the alleged frauds, the civil fraud exception is inapplicable. RJR's claim of privilege is upheld and the redacted paragraph need not be produced.

6. Document 506527727-7732.

***7** This document is identical to document 5. RJR's claim of privilege for the redacted paragraph is valid, and the civil fraud exception does not apply.

7. Document 504406290-6296. "Weekly Highlights--Biochemical/ Biobehavioral For Week of June 3-7, 1985."

This memorandum, stamped "Received H.E. Guess," was written by one RJR scientist for the benefit of another RJR scientist. RJR asserts that the persons identified on the document as receiving copies were RJR scientists and in-house counsel.

The memorandum summarizes the activities of the

Biochemical/Biobehavioral Group, including research on environmental tobacco smoke and attendance at seminars/meetings. With the exception of a paragraph under the heading "Meetings," the entire document has already been produced to the State. RJR has asserted the attorney-client privilege as to this paragraph.

The redacted paragraph summarizes a meeting with in-house counsel to discuss an upcoming meeting. For the most part, this paragraph does not relate to legal issues. Neither the fact that RJR representatives planned to attend a subsequent meeting nor the fact that counsel was updated on the probable agenda of such a meeting reveal a request for legal advice or counsel's response. Similarly, the last sentence, up to the last 24 words, reveals only a business decision, with no hint of any legal evaluation. Thus, the redacted paragraph must be produced up to and including the first half of the last sentence.

From the face of the document, it can be inferred that the decision recounted in the last 24 words of the paragraph required an analysis of various legal principles, including the applicability of the joint defense doctrine. As such, the decision reflects and reveals the advice of counsel.

Contrary to the State's assertion, the civil fraud exception does not invalidate the attorney-client privilege as it applies to the last 24 words of the redacted paragraph. The confidences revealed in that clause do not provide evidence that defendants used CTR to defraud the public, that RJR concealed known health risks associated with its products, or that defendants conspired to stifle competition and/or retard the development of safer products. Thus, the last 24 words of the redacted paragraph are privileged and need not be produced.

8. Document 505348844-8855.

This document was not provided for the court's review. RJR maintains that it has withdrawn its claim of privilege and has produced this document without redactions. The State's papers, however, suggest that it may not have received a copy. Production is required, if not already accomplished.

9. Document 506464687-4700. "Weekly Highlights--Biochemical/ Biobehavioral Week Ending September 25, 1987."

This memorandum, stamped "RJR Confidential," was written by one RJR scientist for the benefit of another RJR scientist. RJR asserts that the persons identified on the document as receiving copies were RJR scientists, employees, managerial employees, and in-house counsel.

***8** The memorandum summarizes the activities of the Biochemical/ Biobehavioral Group. With the exception of a paragraph under the heading "Industrial Hygiene," the entire document has already been produced to the State. RJR has asserted the attorney-client privilege as to this paragraph.

The redacted paragraph reveals the substance of RJR's request for in-house counsel's advice and counsel's response regarding regulatory compliance issues. It is, therefore, privileged.

The civil fraud exception does not apply. The confidences revealed in the redacted paragraph do not provide evidence that defendants used CTR to defraud the public, that RJR concealed known health risks associated with its products, or that defendants conspired to stifle competition and/or retard the development of safer products. Thus, RJR's claim of privilege stands and RJR need not produce the redacted paragraph.

10. Document 504872013-2014. Letter, dated 2/5/81, from William W. Shinn (outside counsel at Shook, Hardy & Bacon) to Thomas F. Ahrensfeld, Max H. Crohn, Jr., Arnold Henson, Ernest Peoples, and Arthur Stevens (general counsel of certain defendant tobacco companies).

This letter indicates that copies were forwarded to Alexander Holtzman, Janet Brown, and Edwin J. Jacob, outside counsel for certain defendant tobacco companies. According to the *Humphrey* **privilege log,** the letter relates to a CTR Special Project. RJR claims that the entire document is subject to the attorney-client privilege.

As noted in Section 2, the privilege is designed to encourage clients to seek the advice of counsel without fear that their confidences will be disclosed to the public. The unfettered transmission of information to and from the attorney is deemed necessary to the effective provision of legal advice. However, the Washington State Supreme Court has noted that the attorney-client privilege should be narrowly construed:

> As the privilege may result in the exclusion of evidence which is otherwise relevant and material, contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege cannot be treated as absolutes[,]

but rather, must be strictly limited to the purposes for which it exists.

Dike v. Dike, 75 Wash.2d 1, 11, 448 P.2d 490 (1968). Where advice given and received is business related, rather than legal, the privilege does not apply. *Dorman*, 30 Wash.App. at 359, 633 P.2d 1340.

In the 2/5/81 letter, Mr. Shinn comments on the referenced research project. The mere fact that an attorney was asked to comment on a particular matter does not, however, reveal whether the request was for legal or business advice. While the initial inference might be that RJR was seeking legal advice from its outside counsel regarding the legal implications and advisability of a particular project, *see* 8 Wigmore, *Evidence* sec. 2296 (rev. ed.1961), the document itself shows that the issues Mr. Shinn considered when making his recommendation were non-legal and focused on the scientific merit, public relations uses, and possible outcomes of the research. Even if Mr. Shinn were aware that this research might later be used in litigation or as a stepping stone for developing friendly witnesses, such legal considerations are not mentioned in the letter and cannot be given a significance the author did not express and of which there is no evidence.

***9** Review of the recommendation letters discussed in Sections 10, 11, 13-15 suggests that the attorneys' oversight of CTR Special Projects did not involve the exercise of legal judgment or the rendering of legal advice, but rather the evaluation of business, scientific, and public relations issues to reach a conclusion as to the advisability of undertaking or continuing each project. As such, the letters are generally not entitled to the protection of the attorney-client privilege.

In the alternative, if the court were to conclude that the 2/5/81 letter contains counsel's legal conclusions regarding the implications and advisability of continuing a Special Project, the document would nevertheless have to be produced under the civil fraud exception to the privilege. The State has alleged that defendants used CTR, which they knew, or at least hoped, was perceived as a scientifically honest and independent organization, to coordinate partisan research efforts designed to bolster defendants' litigation positions. Such use of CTR would be in conflict with the industry's public assurances that the Council would be used to discover and disseminate the truth about smoking and health. Although defendants maintain that they simply wanted to achieve efficiencies by using an existing administrative apparatus to distribute research funds to the Special Projects, defendants could have turned to one of the other industry-controlled organizations, committees, or groups, such as the Tobacco Institute, to handle the required paper work. Instead, defendants opted to use CTR, a decision that was sure to confuse the average member of the general public [FN5] and to give defendants' planned and directed projects an appearance of independence to which they were not entitled. This letter provides prima facie evidence that supports the State's allegations that (1) a fraud was occurring and (2) this communication was made in furtherance thereof. *See* discussion regarding document 4.

FN5. Defendants maintain that they never intended to confuse the public. In support of their position, defendants point out that researchers who received Special Project funds were specifically requested to identify their funding source as a CTR Special Project so as to avoid confusion with projects that had been approved and funded by the Scientific Advisory Board ("SAB"). It is doubtful, however, that an uninvolved scientist, much less a member of the general public, would, upon reading the prescribed credit line, understand the differences between a CTR funded project and a CTR Special Project. Other than being assured that CTR would act with scientific integrity and independence in attempting to identify the connection, if any, between smoking and health issues, the public was given virtually no information regarding the various divisions of CTR or their functions. The fact that the apparently independent and highly respected SAB had no part in the approval or review of the CTR Special Projects becomes evident only with the aid of the detailed affidavits and documentary evidence provided to the court during this round of briefing. The chance that the public would be misled and would be unable to identify which research projects were directed by defendants to promote their legal, business, or public relations interests was so great as to give rise to the inference of fraud.

Thus, even if the letter were interpreted to contain counsel's legal advice regarding the referenced research project, the letter would support the State's claim that defendants used CTR to mislead, confuse, and defraud the public. Under these circumstances, the letter must be produced.

11. Document 503655259-5260. Letter, dated 2/5/79, from Patrick M. Sirridge (outside counsel at Shook, Hardy & Bacon) to Thomas F. Ahrensfeld, Max H. Crohn, Jr., Joseph Greer, Arnold Henson, Ernest Pepples, and Arthur Stevens (general counsel of certain defendant tobacco companies).

This letter discusses a CTR Special Project and indicates that copies were forwarded to DeBaun Bryant, Alexander Holtzman, Lester Pollack, Janet Brown, and Edwin J. Jacob, outside counsel for certain defendant tobacco companies.

RJR claims that the entire document is subject to the attorney-client privilege. For the reasons stated as to document 10, this letter is not entitled to the protection of the privilege and, in the alternative, the court would require production under the civil fraud exception.

12. Document 503566679-6682. Memorandum dated 7/26/80.

***10** This memorandum summarizes a research proposal and estimates the project's costs. RJR asserts that this document concerns a CTR Special Project, was written by Timothy M. Finnegan, outside counsel at Jacob & Medinger, and was forwarded to counsel for certain defendant tobacco companies.

RJR claims that the entire document is subject to the attorney-client privilege. The court disagrees. The memorandum is nothing more than a summary of a proposed research project which could have been written by anyone familiar with the proposal. There is no indication on the face of the memorandum, nor is there other evidentiary support for the assertion, that an attorney had anything to do with either its creation or its review. [FN6] Even if the court were to accept RJR's unsupported representation that Mr. Finnegan wrote this summary, the document contains no legal advice. The document is, therefore, not subject to the attorney-client privilege.

> FN6. The letter that purportedly identified Mr. Finnegan as the author of this memorandum (Exhibit B to the *In Camera* Memorandum of R.J. Reynolds Tobacco Co.) suggests only that Mr. Finnegan transmitted the copies to in-house counsel for the tobacco companies, not that he wrote the attached memorandum.

13. Document 507732213-2214. Letter, dated 8/13/87, from Patrick M. Sirridge (outside counsel at Shook, Hardy & Bacon) to Wayne W. Juchatz, Josiah S. Murray III, Ernest Pepples, Paul A. Randour, and Arthur Stevens (general counsel of certain defendant tobacco companies).

This letter discusses a CTR Special Project and indicates that copies were forwarded to Janet Brown, Francis K. Decker, Jr., and Michael A. Mims, outside counsel for certain defendant tobacco companies.

RJR claims that the entire document is subject to the attorney-client privilege. For the reasons stated as to document 10, this letter is not entitled to the protections of the privilege.

RJR has also asserted the work product doctrine. "[D]ocuments and tangible things otherwise discoverable ... and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent)" are protected as work product. CR 26(b)(4). "[U]nder both the federal and Washington rules, there is no distinction between attorney and nonattorney work product. The test for determining whether such work product is discoverable is whether the documents were prepared in anticipation of litigation ...". *Heidebrink v. Moriwaki*, 104 Wash.2d 392, 396, 706 P.2d 212 (1985). Documents prepared in anticipation of one case are entitled to protection in a second case if the two matters are closely related. *Dever v. Fowler*, 63 Wash.App. 35, 47, 816 P.2d 1237 (1991), *review denied*, 118 Wash.2d 1028, 828 P.2d 563 (1992); 14 *Wash. Practice* sec. 164(2) at 280.

No work product immunity exists for documents prepared in the normal course of business, however. *Escalante.*, 49 Wash.App. at 395, 743 P.2d 832. Where a document was created for both a legal and a nonlegal purpose (*i.e.*, where the document would have been created even if there were no pending or anticipated litigation), the protections of CR 26(b)(4) do not apply. *Griffith v. Davis*, 161 F.R.D. 687 (C.D.Cal.1995); *In re Air Crash at Sioux City*, 133 F.R.D. 515 (N.D.Ill.1990); *Crowe v. Lederle Laboratories*, 125 A.D.2d 875, 510 N.Y.S.2d 228 (App.Div.1986).

***11** RJR has not shown that the project discussed in this letter, or the letter itself, were created in anticipation of litigation. Even if there was some conceivable use for this research in defending

pending or threatened litigation, the reasons Mr. Sirridge gives for supporting the proposed research show that litigation was not an important focus. Rather, Mr. Sirridge highlights the scientific merit of the project when justifying his recommendation. In addition, the potential uses of the research as a public relations tool are more apparent from the letter than are its potential litigation uses.

Even if the court were to conclude that the 8/13/87 letter is entitled to the protections of the attorney-client privilege and/or work product immunity, the document would still have to be produced under the civil fraud exception. Both the attorney-client privilege and work product immunity are destroyed where a party attempts to use them to further or shield on-going or future fraudulent conduct. As noted as to document 10, if the 8/13/87 letter were interpreted to contain counsel's legal advice or were deemed to have been created in anticipation of litigation, the letter would support the State's claim that defendants' used CTR to conduct defense-oriented research and/or to otherwise bolster defendants' litigation position, despite prior assurances that CTR would be used to seek the truth about the relationship between smoking and health. In such circumstances, the letter, as prima facie evidence of fraud, would be stripped of any protections otherwise applicable.

14. Document 503655001-5002. Letter, dated 2/14/80, from Timothy M. Finnegan (outside counsel at Jacob & Medinger) to Thomas F. Ahrensfeld, Max H. Crohn, Jr., Joseph Greer, Arnold Henson, Ernest Pepples, and Arthur Stevens (general counsel of certain defendant tobacco companies).

This letter summarizes a research project, requests reimbursement of certain research expenses, and indicates that copies were forwarded to Janet Brown and William W. Shinn, outside counsel for certain defendant tobacco companies.

RJR claims that the entire document is subject to the attorney-client privilege. The court disagrees. The letter is nothing more than a summary of past research with a request that the tobacco companies reimburse the scientists. Anyone familiar with the research could have written this summary and transmitted the related bill. Although an attorney clearly wrote this letter, it contains no legal advice. In fact, the only advice in the letter is Mr. Finnegan's suggestion that the tobacco companies pay the expert's expenses out of a particular fund. Such advice involves business considerations unrelated to any legal analysis. The letter is, therefore, not subject to the attorney-client privilege.

15. Document 503645740-5741. Letter, dated 6/8/82, from Patrick M. Sirridge (outside counsel at Shook, Hardy & Bacon) to Joseph Greer, Arnold Henson, Alexander Holtzman, Ernest Pepples, Arthur Stevens, and S.W. Witt III (general counsel of certain defendant tobacco companies).

***12** This letter discusses a CTR Special Project and indicates that copies were forwarded to Janet Brown and Edwin J. Jacob, outside counsel for certain defendant tobacco companies.

RJR claims that the entire document is subject to the attorney-client privilege. For the reasons stated as to document 10, this letter is not entitled to the protection of the privilege and, in the alternative, the court would require production under the civil fraud exception.

16. Document 501868279. "Review of 'Summary Report on the Measurement of Cigarette Smoke Deposited in Dogs by a Method Simulating Human Smoking'."

This memorandum was written by one RJR scientist for the benefit of another RJR scientist. The document, which contains illegible marginalia, provides a summary of an on-going research project. As part of its *in camera* submission, RJR offered evidence that the memorandum was written at the request of an RJR attorney.

RJR has claimed work product immunity for the entire document. Such immunity is, however, appropriate only where the primary motivating factor behind the creation of the document was the anticipation of litigation. *Griffith*, 161 F.R.D. at 698-99; *Heidebrink*, 104 Wash.2d at 396, 706 P.2d 212. RJR has provided insufficient evidence from which the court could conclude that this memorandum was written to aid defendants in pending or threatened litigation. From the document and the context in which it was generated, it is more likely that RJR wanted to ensure that its research dollars were being well spent and/or that its public relations organizations had sufficient data to combat the anti-smoking campaigners. Work product immunity is inapplicable.

17. Document 504339837. "Review of 'Summary Report on the Measurement of Cigarette Smoke Deposited in Dogs by a Method Simulating Human Smoking'."

This memorandum appears to be a draft of Document 501868279 (*see* document 16). RJR has claimed work product immunity for the entire document. For the reasons stated as to document 16, such immunity is inapplicable.

18. Document 501013730. Memorandum dated 2/20/80. "Information for Dr. Laurene's Weekly Meeting with Mr. C.G. Tompson."

This memorandum was written by one RJR scientist for the benefit of another RJR scientist, with a copy indicated to a third RJR scientist. The memorandum provides a summary of the on-going debate regarding the relationship between tobacco use and heart disease. Dr. Nystrom, the author of the memorandum, notes that he learned of some of the findings he reports in the memorandum through Timothy M. Finnegan, outside counsel at Jacob & Medinger. RJR asserts that part of the summarized research was funded as a CTR Special Project. RJR claims that this document is protected under both the attorney-client privilege and the work product doctrine.

The attorney-client privilege is inapplicable. The involvement of Mr. Finnegan was limited to informing one scientist about another scientist's work. Factual information does not become privileged merely because it was transmitted through an attorney. *United States v. Defazio,* 899 F.2d 626 (7th Cir.1990). There is no indication that Mr. Finnegan was providing legal advice or doing anything other than reporting on scientific research. Where an attorney is involved in a non-legal capacity, there is no privilege. *Dorman,* 30 Wash.App. at 359, 633 P.2d 1340. Even if the memorandum was written at the request of counsel, no legal issues are presented or discussed. Further, it is apparent from the title of the memorandum that the information, if not the document itself, is to be disclosed to "Dr. Laurene" and "Mr. C.G. Tompson," neither of whom have been identified by RJR. It appears, therefore, that the information contained in this memorandum cannot be shielded by the attorney-client privilege because it was neither legal in nature nor confidential.

***13** RJR's claim of work product immunity also fails. There is no indication that Dr. Nystrom wrote this memorandum because of actual or anticipated litigation. The memorandum mentions no litigation-related issues. In fact, the memorandum clearly indicates that the summary was written for non-litigation purposes, to update Dr. Rodgman and/or Dr. Laurene in preparation for an upcoming meeting. Thus, the work product doctrine is inapplicable.

Even if the court were to assume that this memorandum contained legal advice or was written in anticipation of litigation, it would still have to be produced under the civil fraud exception. As with document 10, the memorandum supports the State's claim that defendants used CTR to conduct defense-oriented research and/or to otherwise bolster defendants' litigation position, despite public assurances that CTR would be used to fund independent research under the Scientific Advisory Board. Thus, the letter provides prima facie evidence that supports the State's allegations that (1) a fraud was occurring and (2) this communication was made in furtherance thereof (*see* discussion regarding document 4) and would be stripped of any protections otherwise applicable.

19. Document 500296370. "The Measurement of Cigarette Smoke Deposited in Dogs by a Method Simulating Human Smoking."

This memorandum was written by one RJR scientist for the benefit of another RJR scientist. The memorandum, which is dated 3/8/68, provides a summary of an on-going research project. RJR asserts that the research was funded as a CTR Special Project.

RJR claims that this document is protected under the work product doctrine. No evidence exists, however, to support the contention that the document was written because of actual or threatened litigation. Even if Dr. Nystrom, the author, wrote this summary at the request of the legal department, an assertion for which RJR has offered no evidence, [FN7] it is more likely that the evaluation was conducted to ensure that RJR was spending its research monies wisely. Thus, the work product immunity is inapplicable.

> FN7. The note that purportedly shows that this memorandum was written at the request of counsel (Exhibit A to the *In Camera* Memorandum of R.J. Reynolds Tobacco Co.) refers only to memoranda drafted by Dr. Colby, not to those drafted by Dr. Nystrom.

Even if the court were to assume that this memorandum was written in anticipation of litigation, it would still have to be produced under the civil fraud exception. As with document 10, the memorandum supports the State's allegations that (1) defendants used CTR to mislead, confuse, and

defraud the public and (2) this communication was made to further such activities. The letter would, therefore, be stripped of any protections otherwise applicable.

20. Document 501558389-8411. "Tobacco Glycoprotein, Page Contamination, Activation of Coagulation, Fibronolytic, Complement, and Kinin Systems: A Critical Reevaluation."

This report, which contains marginalia, was written by one of RJR's outside consultants. RJR asserts, without support, that the report was prepared "on behalf" of counsel and was forwarded by outside counsel to RJR scientists for comment.

***14** RJR claims work product immunity for this report. No evidence exists, however, to support the conclusion that this research was performed, or the report was created, primarily in anticipation of litigation. Rather, it appears that defendants hired the author, Dr. Rodger L. Bick, to critique and cast doubt upon another researcher's conclusions regarding the relationship between tobacco use and cardiovascular and pulmonary disease in humans. Even if the report could be or ultimately was used in defending pending or future liability claims, the immediate purpose behind the research and related report was to provide data that could be used to mitigate any public relations damage attributable to the earlier, negative conclusions drawn by Dr. Carl Becker. RJR cannot rest on its unsubstantiated assertions that the report was created "on behalf" of counsel. Even if it could, there is still no suggestion in the report or in supplemental evidence supplied by RJR that the report was primarily intended to be used as a litigation tool. Thus, work product immunity is inapplicable.

21. Document 500500337-0340. "Minutes of Meeting of Industrial Technical Committee With Representatives From the Council for Tobacco Research--September 25, 1967."

This memorandum, dated 9/27/67 and stamped "Confidential--For Use of Counsel Only," was written by one RJR scientist for an RJR in-house attorney. RJR asserts that the person identified on the document as receiving a copy is an RJR managerial employee.

The memorandum summarizes projects being sponsored by CTR and contains a brief discussion regarding the respective roles of the Industrial Technical Committee and the Scientific Advisory Board in awarding CTR grants. RJR asserts that the minutes were drafted on behalf of in-house counsel to enable counsel to review the proceedings and ensure compliance with various regulatory schemes.

RJR claims that the entire document is subject to the attorney-client privilege. RJR has offered no evidence, however, to support its assertion that in-house counsel reviewed these minutes to monitor the industry's regulatory compliance. Even if the court accepted such an unsubstantiated claim, the document itself does not reflect or contain a request for legal advice on such matters, nor does it suggest that a review by counsel is expected. Thus, production of the document could not reveal the nature of RJR's alleged request for legal advice nor the response, if any, provided by the attorney.

One portion of the minutes, however, reflects the advice of counsel. The third paragraph and the first two sentences of the fourth paragraph under the heading "Future Relations of Industry Technical Committee, Personnel of C.T.R., and the Scientific Advisory Board," report the opinions of counsel for American Tobacco Company. The context of the discussion supports the inference that Ms. Brown's opinions are based on her legal expertise. Thus, the third paragraph and first two sentences of the fourth paragraph are subject to the privilege and may be redacted.

***15** The civil fraud exception to the privilege does not apply to the advice of American's counsel. The third paragraph and first two sentences of the fourth paragraph have nothing to do with CTR and contain no evidence that RJR concealed known health risks associated with its products or conspired to stifle competition. Thus, RJR's claim of privilege is upheld as to those portions of the minutes.

22. Document 503240749-0764. "66th Annual Meeting of the Federation of American Societies for Experimental Biology--New Orleans, LA, April 15-23, 1982."

This synopsis was ostensibly written by Kenneth G. Orloff, an RJR scientist. The note in the margin reads "1982 Meeting," and the document consists of a series of short blurbs on various research projects that were presented at the conference. The opening paragraph of each summary appears to have been copied from information provided at the Annual Meeting and is followed by Mr. Orloff's quick summary/critique of the data and conclusions presented. RJR asserts that Mr. Orloff created this synopsis in an effort to keep litigation counsel abreast of new research.

RJR claims work product immunity for this document. Nothing in the document, however, suggests that this synopsis was created to aid counsel in litigation. In fact, RJR asserts in the *Humphrey* log that the document was copied to another RJR scientist, not an attorney. It appears to be more likely that the summary was drafted as a means of keeping other RJR scientists, and possibly RJR counsel, informed of research developments that were of interest for scientific, public relations, and litigation purposes. Documents that would have been generated in the normal course of business are not entitled to work product immunity. *Escalante*, 49 Wash.App. at 395, 743 P.2d 832. Thus, this summary, which more likely than not was created to share knowledge gained through attendance at a scientific conference, even in the absence of any pending or anticipated litigation, is not protected as work product.

Even if the court were to conclude that this synopsis was created primarily in anticipation of litigation, the document would still have to be produced under the civil fraud exception. The State has alleged that RJR perpetrated a fraud by concealing information that its product poses a substantial risk to human health. This document, which includes summaries of a number of research projects that purport to find a relationship between tobacco use and adverse health consequences, provides evidence of fraud and would, therefore, be stripped of any applicable immunity.

23. Document 502853948-3963. "Federation of American Societies for Experimental Biology--Atlanta, GA, April 12-17, 1981."

This synopsis was ostensibly written by Kenneth G. Orloff, an RJR scientist. The format of this document is very similar to that used in document 22. For the reasons stated as to document 22, document 23 is not entitled to work product immunity and, in the alternative, the document would have to be produced under the civil fraud exception as evidence of fraud.

24. Document 504872910-2911 (parties refer to this document as 504872810- 2811). "Federation of American Societies for Experimental Biology--Atlanta, GA, April 12-17, 1981."

***16** This synopsis consists of two pages from document 23. For the reasons stated as to document 22, document 24 is not entitled to work product immunity and, in the alternative, the synopsis would have to be produced under the civil fraud exception as evidence of fraud.

25. Document 500943232-3277. Cover letter and attached draft response to the Consumer Consultive Committee's report on "Tobacco and the Health of the Consumer."

The cover letter, dated 7/29/78, was written by Timothy M. Finnegan, outside counsel with Jacob & Medinger, and was sent or copied to RJR in-house counsel and scientists, various outside counsel, and tobacco industry representatives to an international trade association. The original author of the draft response is not clear from the document, although Mr. Finnegan reports that he has incorporated some suggested changes into this draft. RJR claims that the entire document is subject to the attorney-client privilege.

The privilege is applicable only where the communication would reveal a client's request for, or an attorney's provision of, legal advice. In this instance, RJR appears to have used outside counsel as a scrivener, without regard for legal expertise. The draft response was created to combat the conclusions reached in a scientific report and is based solely on non-legal sources of information. Even assuming that the attorney had a role in shaping the industry's response to the CCC's report, as asserted by RJR, neither the response nor the cover letter contain any legal analysis or request for advice that would justify the application of the privilege. Any person familiar with the history of the tobacco and health controversy could have written and forwarded this report.

Further, RJR has offered no evidence to support the conclusion that the draft response was intended to be confidential. The document itself reveals that it was to be distributed as the industry's "response to the Report of the Tobacco Group of the EEC Consumer Consultive Committee." Nothing indicates that further revisions were made to this document or that it was ultimately decided not to release the document to third parties. The party asserting the privilege has the burden of showing that the draft or portions thereof were kept confidential and not distributed to third parties. *United States Postal Serv. v. Phelps Dodge Refining, Corp.*, 852 F.Supp. 156 (E.D.N.Y.1994). RJR has not met its burden here.

Both the cover letter and the attached draft response must be produced.

26. Document 500943188-3214. Draft response to the Consumer Consultive Committee's report on "Tobacco and the Health of the Consumer."

It appears that one of the recipients of document 25 made handwritten changes throughout the document, giving rise to this version of the draft. RJR asserts, without support, that this copy of the draft response was forwarded to two RJR attorneys and an RJR scientist for their comments.

***17** RJR asserts that the attorney-client privilege applies to this document. For the reasons stated as to document 25, the court disagrees and orders production. Neither the draft response nor the handwritten comments reveal a request for or provision of legal advice, and RJR has failed to show that the information was intended to be confidential. Thus, the privilege is inapplicable.

27. Document 500943444-3481. Draft response to the Consumer Consultive Committee's report on "Tobacco and the Health of the Consumer."

It appears that this draft preceded document 25 and was, at some point, substantially rewritten. RJR asserts, without support, that the handwritten comments included in document 27 were written by F.G. Colby, an RJR scientist.

RJR claims that the attorney-client privilege and work product immunity apply to this draft. The communication does not, however, reveal RJR's request for, or an attorney's provision of, legal advice. In fact, counsel's involvement in this draft is not apparent: there is no indication that counsel wrote, commented on, or even reviewed this version of the draft response. Even if it can be assumed that counsel took part in the drafting or revising of this document, counsel's role would be that of a scrivener, without regard for legal expertise. Any person familiar with the history of the tobacco and health controversy could have written this draft, which contains no legal analysis or legal advice. Thus, the privilege does not apply.

The work product doctrine does not apply because there is no evidence that this response was drafted, or the handwritten comments were included, in anticipation of litigation. Rather, the clear indication from document 27 and the other documents discussed in Sections 25-30 is that the response was written primarily to counter any adverse publicity arising out of the "Tobacco and the Health of the Consumer" report. The work product immunity does not shield documents that were created for public relations purposes.

28. Document 500943605-3651. Draft response to the Consumer Consultive Committee's report on "Tobacco and the Health of the Consumer."

This draft of the response may have been the one on which Timothy M. Finnegan, outside counsel at Jacob & Medinger, recorded the changes he eventually incorporated into document 25. RJR asserts, without support, that this copy of the draft response was forwarded to two RJR attorneys and an RJR scientist for their comments.

RJR claims that the attorney-client privilege applies to this document. For the reasons stated as to document 25, production is required. Neither the draft response nor the handwritten comments reveal a request for or provision of legal advice, and RJR has failed to show that the information was intended to be confidential. Thus, the privilege is inapplicable.

29. Document 500943824-3844. Draft response to the Consumer Consultive Committee's report on "Tobacco and the Health of the Consumer."

***18** It appears that this draft, dated 5/12/78, preceded document 25 and was, at some point, substantially rewritten. This document is very similar to document 27, although the handwritten notes are different. RJR asserts, without support, that the handwritten comments were written by F.G. Colby, an RJR scientist.

RJR claims that this draft is subject to the attorney-client privilege and the work product immunity. For the reasons noted as to document 27, those protections do not apply.

30. Document 501473807-3854. Draft response to the Consumer Consultive Committee's report on "Tobacco and the Health of the Consumer."

This draft, dated 7/20/78, preceded, but is very similar to, document 25. Some of the handwritten changes included in document 30 are incorporated into the later draft.

RJR asserts that the attorney-client privilege applies to this document. For the reasons stated as to document 25, the court disagrees and orders production. Neither the draft response nor the handwritten comments reveal a request for or provision of legal advice, and RJR has failed to show that the information was intended to be confidential.

31. Document 504760683-0687. Handwritten notes.

This document consists of five pages of handwritten notes concerning a 10/1/85 meeting of an industry trade group. RJR asserts, without evidentiary support, that M.E. Ward, an RJR in-house attorney, took these notes. RJR has claimed both the attorney-client privilege and work product immunity for this document.

The privilege is not applicable. Even if an attorney created the notes, they do not reflect RJR's request for, or counsel's provision of, legal advice. Rather, the notes are simply minutes of a meeting, with little or no substantive input by the note taker.

Two sections of the notes mention an attorney "Hoel." The simple recitation of an attorney's activities does not reveal legal advice, however. Since neither passage discloses any confidential legal communication between attorney and client, the privilege is not applicable.

RJR's claim of work product immunity also fails. To qualify as work product, the document at issue must be created primarily in anticipation of litigation. Neither the contents of the notes nor the purposes of the host trade group supports the conclusion that this document was created in preparation for litigation. It appears more likely that the meeting was held to track industry research on tobacco-related issues for scientific, public relations, and litigation purposes.

Thus, RJR's claims of attorney-client privilege and work product immunity fail.

32. Document 500849610-9622. Handwritten notes.

This document consists of a cover page and 12 pages of handwritten notes concerning an 11/15/78 tobacco industry meeting. Meeting participants included in-house and outside counsel, industry scientists, and industry executives. RJR asserts, without support, that C.A. Tucker, RJR's vice- president of public relations, took these notes.

***19** RJR has claimed the attorney-client privilege for this document. The purpose of the meeting appears to have been to develop an industry-wide plan to meet the changing research demands of litigation. The document contains counsel's advice on how the tobacco industry should respond to its litigation needs, witness development issues, and scientific hearings. The historical and potential roles of CTR in meeting the industry's research requirements are discussed at length. Because production of this document would reveal confidential communications between the industry and its outside counsel on various legal issues, the privilege applies.

Production is nevertheless appropriate if the document supports the State's allegations that (1) defendant was engaged in or planning a crime or fraud and (2) the document was created in furtherance thereof. *See* discussion regarding document 4. The court finds that this document contains evidence that defendants used CTR, an entity they had presented to the public as scientifically honest and independent, to coordinate partisan research efforts and to promote their public relations positions. There is also language from which a jury could conclude that the industry was aware that its multiple uses of CTR may have confused the public and that the industry purposefully avoided obtaining knowledge regarding the health risks of its products. This document, therefore, provides prima facie evidence of the State's allegation of civil fraud and is stripped of any applicable privilege.

33. Document 503684208-4210. Handwritten notes.

This document consists of three pages of handwritten notes concerning a meeting attended by various industry counsel and executives. RJR asserts, without support, that the notes were taken by Henry H. Ramm, an RJR in-house counsel, and that they document a 9/22/66 meeting of the Committee of Counsel.

RJR has claimed both the attorney-client privilege and work product immunity for this document. The assertion of the privilege fails for two reasons. First, even if the court accepts RJR's representation that the notes reflect a meeting of the Committee of Counsel, none of the topics discussed involve the giving or receiving of legal advice. Although the document reports certain contacts with regulatory agencies and summarizes on-going research projects, the purpose of the meeting is to keep the attorneys informed rather than to convey an industry request for legal services. Even where there appears to be some advice, such as in the last paragraph, RJR has failed to show that the individuals involved are attorneys or that their advice was legal, rather than business, in nature.

Second, it appears that RJR has waived its claim of attorney-client privilege because no such claim was made when the *Burton* court considered the production of these documents. For the reasons stated in Section 1.a., the attorney-client privilege

does not apply.

RJR's claim of work product immunity fails because there is no indication, either in the document itself or in the submissions of RJR, that this meeting was held, or these notes were taken, in anticipation of litigation. While it is true that the tobacco industry has had to defend liability suits since approximately 1954, the pendency of litigation does not automatically cloak all activities with work product immunity. The test is whether the document was created because of the litigation. Where a document would have been created regardless of actual or anticipated litigation, it is not entitled to immunity. As discussed above, these notes were generated as part of an effort to keep industry counsel informed about the research efforts and regulatory contacts of their clients. No evidence exists that the meeting was held or the notes taken in response to a particular litigation, either civil or regulatory. Thus, the notes are not entitled to work product immunity.

CONCLUSION:

***20** The following documents shall be produced in their entirety:

1. Document 506527953-7958
2. Document 504484390-4395
3. Document 506464000-4011
8. Document 505348844-8855
10. Document 504872013-2014
11. Document 503655259-5260
12. Document 503566679-6682
13. Document 507732213-2214
14. Document 503655001-5002
15. Document 503645740-5741
16. Document 501868279
17. Document 504339837
18. Document 501013730
19. Document 500296370
20. Document 501558389-8411
22. Document 503240749-0764
23. Document 502853948-3963
24. Document 504872910-2911
25. Document 500943232-3277
26. Document 500943188-3214
27. Document 500943444-3481
28. Document 500943605-3651
29. Document 500943824-3844
30. Document 501473807-3854
31. Document 504760683-0687
32. Document 500849610-9622
33. Document 503684208-4210

The following document shall be produced with the redactions discussed above:

4. Document 504651149-1158
5. Document 504085341-5346
6. Document 506527727-7732
7. Document 504406290-6296
9. Document 506464687-4700
21. Document 500500337-0340

1997 WL 728262, 1997 WL 728262 (Wash.Super.)

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